No. 17298

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CMAX, Inc., also D.B.A. City Messenger of Hollywood and City Messenger Air Express,

Appellant,

vs.

Drewry Photocolor Corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

The complaint, filed on December 15, 1959, is in two counts. The first count alleges that appellee is indebted to appellant for a balance of $12,696.09 plus interest, for services rendered by appellant as an air-freight forwarder during the period January 1955 to and including February 1957. The second count alleges that said amount is the balance due "upon an open book account". [Tr. 3.]

After answer was filed, appellee moved for judgment on the pleadings or, in the alternative, for summary judgment, as to the entire complaint and each count thereof. [Tr. 12.]

The motion for summary judgment was denied. [Tr. 29.] The motion for judgment on the pleadings was granted as to the second count and denied as to the first count. [Tr. 29.] Judgment was entered accordingly [Tr. 31] and this appeal followed. [Tr. 32.]

The Issue on Appeal.

The sole issue on this appeal is whether the complaint shows on its face that the alleged undercharges are not part of "an open book account".

Appellant is mistaken in suggesting that appellee's motion for judgment on the pleadings must be regarded as a motion for summary judgment. Appellee's motion was in the alternative [Tr. 13] and the District Judge expressly excluded "all matters in the file outside the pleadings" in announcing his decision on the motion for judgment on the pleadings. [Tr. 29.] It is not believed that Rule 12(c) intends to preclude the contemporaneous filing and determination of both motions. They are traditionally so filed and considered (*Sauquoit Valley Farmers Co-op. v. Wickard,* D. C. N. Y. 1942, 45 Fed. Supp. 104; *Palmer v. Palmer,* D. C. Conn. 1940, 31 Fed. Supp. 861, 863). In all events, the judgment was correct and no prejudice to appellant resulted from the court's dismissal of the second count on the one ground rather than the other. Dismissal was proper, as hereinafter shown, whether or not matters not part of the pleadings were considered.

ARGUMENT.

In summary, appellee contends:

(1) The first count alleges an express contract or contracts for airfreightage and non-payment of part of the contract price, recovery for part or all of which is barred by the statute of limitations. The second count alleges an open book account based on the same facts. The only function of the second count is to avoid the statute of limitations. This is not permitted.

(2) The second count attempts to add to the supposed "account" items that were not included therein at the time the account was current. This is not permitted.

(3) But in all events the complaint shows that the account, if ány, on which the second count is based is neither an "open" account nor a "book" account but, if an account at all, is a "simple" or "ordinary" account as these terms are defined by applicable law, the distinction being significant in light of the statutes of limitations.

1. The Complaint Pleads the Same Cause of Action on Two Counts.

The Second Count incorporates by reference all the averments of the First Count, including the averments on paragraph 8 that the freightage transactions began in January 1955 and ended in February 1957. [Tr. p. 6.] Paragraph 2 of the Second Count alleges that CMAX entered in its books the charges as stated in its air bills contemporaneously with said transactions, but did not enter the alleged undercharges until August 1959 [Tr. 7], two and a half years later.

The First Count is based on alleged failure of Drewry to pay the rates established by the published tariffs of CMAX. [Paragraphs 4 and 6, Tr. 4-5.] The applicable statute of limitations on that cause of action is either two years, on an implied contract (Sec. 339(1) Calif. C. C. P.) or three years, on an obligation imposed by statute (Sec. 338(1); Sec. 737, Calif. Pub. Utils. Code), or four years, on each written contract of freightage (Sec. 337(1).) The Second Count is an attempt to plead the same contract action as an open book account to gain the benefit of the four year statute, commencing from the date of the last entry in the supposed account (Sec. 337(2).)

2. Pleading a Cause of Action on an Account to Evade the Applicable Statute of Limitations Is Not Permitted.

In *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48, at p. 55 the court said:

> ". . . the law will not permit a person, where his claim on express contract is barred by the statute of limitations, to evade the statute by the device of pleading that claim as an open account. That is undoubtedly the law. (*Tillson v. Peters,* 41 Cal. App. 2d 671 (107 P. 2d 434); *Cleveland v. Inter-City Parcel Ser.,* 22 Cal. App. 2d 574 (72 P. 2d 179); *Lee v. DeForest,* 22 Cal. App. 2d 351 (71 P. 2d 285); *Stewart v. Claudius,* 19 Cal. App. 2d 349 (65 P. 2d 933); *People v. California S. Deposit etc. Co.,* 41 Cal. App. 727 (183 P. 289).)"

To like effect: *Parker v. Shell Oil Co.,* 29 Cal. 2d 503, 507.

The case of *Cleaveland v. Inter-City Parcel Service, Inc.*, 22 Cal. App. 2d 574, reviews the California cases holding that where plaintiff's cause of action is in fact based upon an express contract the applicable statute of limitations may not be evaded by casting the pleading in the form of an action on a book account (pp. 580-582.) It was there held that the unilateral keeping of account books in which entries were made for charges whose validity could be established only by proof of an express contract provided no basis for an action on a book account (p. 582.).

3. The Complaint Shows That the Claimed Obligation Sued Upon Is Not an Open Account.

An "account" is a record of transactions involving debits and credits *(Millet v. Bradbury,* 109 Cal. 170, 173.).

A "book account" is defined by Sec. 337a California C. C. P. as:

> "The term 'book account' means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is *entered in the regular course of business as conducted by such creditor* or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Emphasis added.)

In *Costello v. Bank of America National Trust and Savings Association,* 246 F. 2d 807, 812, this court, applying California law, held that an account is not "open" unless its currency, or *openness,* is intended by both parties to the account. This court said (812-813):

> ". . . a requisite of an open book account is that it be treated as such by the transacting parties. . . .
>
> * * *
>
> ". . . The record discloses no evidence that *both* the bankrupt and the State treated the account book as an 'open book account'. Thus, the conclusion that the assigned account was represented by 'an open book account' in the sense of that phrase as it has been interpreted by the California courts, cannot stand. Therefore, we hold that there was no open book account to come within the statute, and no necessity to file notice of the assignment."

In *Merchants Collection Agency v. Levi,* 32 Cal. App. 595, it was stated that the openness of the account depends upon the intent of the parties (p. 597).

CMAX entitled its complaint herein "Complaint for Freight Undercharges" [Tr. 3] and alleges that the claimed undercharges were entered in CMAX's books in August 1959, two years and six months after the last shipping transaction occurred and the charges therefor entered in the books. It clearly appears, therefore, that this suit for "Freight Undercharges" aims to recover $12,696.09 of alleged undercharges unilaterally entered by CMAX in its books two and a half years

after the termination of the shipping relations between the parties. The "openness" of the account thus depends entirely on the unilateral act of only one of the parties, which is exactly the deficiency that condemned the openness of the account in the *Costello* case, *supra*.

In *Groom v. Holm,* 176 Cal. App. 2d 310, the contract on which the account was based required periodical payments of the balance due. This prevented the account from being "open". The court said (p. 312):

> "To escape the statutory bar upon an oral agreement and to find refuge in the four year provision for a mutual open and current account, appellant must prove the account remained open. Since the parties 'struck a balance' here on a bimonthly basis, the 'open' account terminated.
>
> "The authorities clearly call for a mutual account which is open and current. The striking of a balance by the parties closes the open account, transforming it into an account stated. The early California case of *Norton v. Larco* (1866), 30 Cal. 126 (89 Am. Dec. 70), puts the matter succinctly: 'Where there are demands on each side, the striking of a balance converts the set-off into payment, (*Ashby v. James,* 11 Mees. and Welsby, 542), and from the time the balance is ascertained by the parties and is admitted to be due from the one to the other, *the account is at an end,* and the ascertained balance is immediately subjected to the operation of the statute, as an original and separate demand. (Angell on Lim., Chap. 14 §8.)' (P. 130)." (Emphasis added.)

If the record on this appeal is deemed to correctly include the affidavit of Elliott S. Fullman [Tr. 21], as contended by CMAX, Exhibit D thereof shows that the account was periodically balanced and settled, which also prevents it from being an "open" account. *Groom v. Holm, supra,* and the authorities therein cited.

4. The Complaint Shows That the Claim Sued Upon Is Not a Book Account.

The supposed "account" not only is not "open", but is not a "book" account within the legal meaning of that term.

The mere entry of memoranda in a book does not create a book account. In *Warda v. Schmidt,* 146 Cal. App. 2d 234, the court said (p. 237):

> "A book account is created by the agreement or conduct of the parties thereto. (*Mercantile Trust Co. v. Doe,* 26 Cal. App. 246 (146 P. 692); *Gardner v. Rutherford,* 57 Cal. App. 2d 874, 885-886 (136 P. 2d 48); *Parker v. Shell Oil Co.,* 29 Cal. 2d 503, 507 (175 P. 2d 838).) The mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account. (*Stewart v. Claudius,* 19 Cal. App. 2d 349, 352 (65 P. 2d 933); see also *Tillson v. Peters,* 41 Cal. App. 2d 671, 676-677 (107 P. 2d 434); *Lee v. DeForest,* 22 Cal. App. 2d 351, 360-361 (71 P. 2d 285).) Such memoranda cannot be utilized under the guise of a book account as a device to extend the statute of limitations beyond the time it would run on the

> contractual obligation. (See cases collected in *Parker v. Shell Oil Co.,* 55 Cal. App. 2d 48 at page 55 (130 P. 2d 158.).)".

To like effect are *Richmond v. Frederick,* 116 Cal. App. 2d 541, 545 and *Gray v. Hall,* 104 Cal. App. 418, 419.

The statute (Sec. 337a, Calif. C. C. P.) requires that the statements in a book account be "entered in the regular course of business". This means that entries not only must relate to the course of dealing between the parties but must be made at or near the time of the transactions so recorded.

In *Egan v. Bishop,* 8 Cal. App. 2d 119, the court rejected items of a book account that were not entered in the course of the business transactions between the parties but, as in the case at bar, were added after those transactions had terminated. The court said (p. 126):

> "Included in the total amount of the verdict were items amounting to $499.86 which were included in the statement rendered but were not contained in the book account. They were more than two years old and action for their recovery was barred before the statement was rendered. The statement of the account did not revive them. (Code Civ. Proc., sec. 360.) The recovery was excessive in this amount."

In *Burchell v. Rohnert,* 133 Cal. App. 2d 82, an effort to avoid the statute of limitations by casting the complaint in the form of an action on a book account was rejected by the court, it being shown that at the

time the account was current no entry was made concerning the matters in dispute (pp. 86-87).

In *Landis v. Turner,* 14 Cal. 573, it was held that long delay in transferring entries from original memos to the permanent account book makes the book inadmissible as evidence of the account (p. 576).

In *Tipps v. Landers,* 182 Cal. 771, a lapse of six months between the transaction and its book entry was held, with other irregularities, to prevent the record from qualifying as a book account. The court said it has to be

> "a correct record made at the time of the transactions and in the usual course of business."

The cases of *Warda v. Schmidt,* 146 Cal. App. 2d 234 and *Higby v. Burlington C. R. & N. Ry. Co.,* 99 Iowa 503, 68 N. W. 829, cited by CMAX, do not suggest a contrary rule.

The *Warda* case held that entries made in a book account by a construction materials supplier just before the conclusion of the construction job were not unduly delayed inasmuch as it was customary in the trade between suppliers and building contractors to defer book entries until all quantities required for the job should be definitely known. This custom was within the knowledge and intent of the parties.

The *Higby* case in Iowa held that action may be maintained on an "open account" for recovery of overcharges by a rail carrier. That case differs significantly from the case at bar in that the overcharges were necessarily included in the accounting record of freight charges collected, whereas it is the essence of

the issue on this appeal that CMAX's alleged undercharges were not entered in its books until long after the account between it and Drewry had been terminated.

The essential vice of the CMAX contention lies in the opportunity for miscarriage of justice, if not for downright fraud, that it implies. If one party to a series of old and closed business transactions, as to which records and recollections may be lost, can revive them by the expedient of unilateral entries in old ledgers the whole purpose of statutory limitations is subverted. The liberal rule allowing the statute of limitations to commence running from the date of the last entry in an account duly kept in regular course of business never has been perverted to allow one party to ancient and closed transactions to revive them merely by adding something to the record book and calling it the "last entry".

Respectfully submitted,

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